No. 3421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

FRANK H. SCHURMANN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District and Territory of Hawaii.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is an appeal from the decree of the District Court for the District and Territory of Hawaii cancelling the certificate of naturalization of Frank H. Schurmann, who prosecutes this appeal alleging error in nineteen particulars (Tr. pp. 108-112); however, the brief of appellant seems to rely principally upon three points: (1) Finality of the judgment of naturalization; (2) Insufficiency of the Bill to charge fraud and (3) Insufficiency of evidence to sustain charge of fraud.

The material allegation of the complaint is as follows:

"Sixth. That the said certificate of citizenship that was then and there issued to respondent as aforesaid was procured by respondent by fraud, in this: That at the time respondent made the oath of allegiance referred to in the next preceding paragraph, he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor; complainant alleges that the respondent did not at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor, but did then and there fraudulently reserve and keep in whole, or in part, his allegiance and fidelity to the Imperial German Government, and to William II, German Emperor." (Tr. p. 11.)

The procedure for cancellation of a certificate of naturalization fraudulently or illegally obtained is as follows:

"It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizen-

ship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"* * * The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any Court exercising jurisdiction in naturalization proceedings under prior laws." (June 29, 1906, c. 3592. Sec. 15, 34 Stat. 601.)

SECTION 15 OF THE NATURALIZATION ACT PROVIDES FOR A TEST OF THE RIGHT TO THE PRIVILEGE OF CITIZENSHIP.

Preliminary to taking up the points contended for by appellant's counsel, we would respectfully direct attention to the general nature of the proceedings by which Dr. Schurmann's certificate of naturalization was cancelled.

They are proceedings which do not necessarily infer moral turpitude, although we may maintain the opinion that one who exercised fraud upon a Court of Justice is in a degree guilty of moral

turpitude; however, these proceedings are in no respect criminal in their nature. All that was sought and accomplished by the proceedings before the District Court was to take from Dr. Schurmann the privilege which had been improperly granted to him when the Court discovered that it had been so improperly granted.

As set out in the case of *Johannessen* v. *U. S.*, 225 U. S. 227; 56 L. Ed. 1066 at 1071, quoting Judge Cross in *U. S.* v. *Spohrer,* 175 Fed. 440.

> "'An alien friend is offered, under certain conditions, the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the Acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud cannot be substituted for facts.' And again, at p. 446: 'That the Government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is in my judgment well settled; and, if that be true of property, then by analogy and with greater reason, it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner.'"

CONCEDING NATURALIZATION TO BE A FINAL JUDGMENT SECTION 15 OF THE NATURALIZATION ACT OF JUNE 29, 1906, IS SUFFICIENT AUTHORITY FOR THE COURT TO CANCEL CERTIFICATE OF NATURALIZATION.

In *U. S.* v. *Ness,* 245, U. S. 319, 62 L. ed 321 at 324.

A court propounded the following question:

> "Whether an order entered in a proceeding to which the United States became a party under Section 11 is *res judicata* as to matters actually litigated therein so that the Certificate of Naturalization cannot be set aside under Section 15, as being 'illegally' procured."

In this case the United States had entered its appearance under section 11 of the Naturalization Act in opposition to the granting of naturalization and submitted a motion that the petition be dismissed on the ground that the Certificate of Arrival was not attached. This motion was denied and the order denying it sustained by the Circuit Court of Appeals for the 8th circuit. The Supreme Court in discussing the question thus propounded by it stated:

> "A decision on such minor questions, at least of a state court of naturalization, is, though, clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. For Congress did not see fit to provide for a direct review by writ of error

> or appeal. But where fraud or illegality is charged, the act affords, under Section 15, a remedy by an independent suit "in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit."
>
> "Section 11, unlike section 15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under section 11 on behalf of the Government should be held to create an estoppel, no good reason appears why it should not arise equally whether the appearance is by the duly authorized examiner or by the United States attorney. But in our opinion section 11 and section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization. The decision of the Circuit Court of Appeals is therefore reversed."

That the act is constitutional and valid even in its retrospective operation seems to have been amply decided.

In *Luria* v. *U. S.* 231, U. S. 9; 58 L. Ed. 101, at page 106, the Court said:

> "Perceiving nothing in the prior laws which shows that Congress could not have intended that the last paragraph of Sec. 15 of the Act of 1906 should be taken according to the natural meaning and import of its words, we think, as before indicated, that it must be regarded as extending the preceding paragraphs of that section to all certificates of naturalization, whether secured theretofore under prior laws, or thereafter under that act."

See also *U. S.* v. *Mansour,* 170 Fed. 671, *Johannessen* v *U. S.,* 225 U. S. 227; 56 L. Ed. 1066 at 1070.

FRAUD IS SUFFICIENTLY SET FORTH AND ALLEGED IN THE BILL.

The fact alleged in the bill, to-wit:

That while appellant swore that he renounced and abjured allegiance to the German Emperor, he did in truth reserve and keep allegiance and fidelity to the German Emperor—is a fact which may be established by competent evidence.

It is conceded that facts must be shown by the bill sufficient to enable the Court to judge whether or not the certificate was fraudulently obtained, but it does appear quite sufficient that the certificate has been fraudulently obtained if when appellant appeared before the Court and used words indicating that he forswore his allegiance to every foreign potentate, he at the same time fraudulently reserved and kept his allegiance and fidelity to such a foreign potentate. For by that act he committed a fraud upon the court in the very matter essential to his admission to citizenship and without which he would not have been entitled to a certificate of naturalization. That he falsely reserved his allegiance is the fact in issue and a sufficient fact for

the Court to have refused the issuance of a certificate had it been known. Not only his negativing of allegiance to the German Emperor, but also his affirmation of allegiance to the United States were as conditions precedent to the issuance of the certificate of naturalization.

> *U. S.* v. *Spohrer,* 175 Feb. 440,
> *Johannessen v U. S.,* 225 U. S. 225; 56 L. Ed. 1066.

The Naturalization Act, Section 15, provides for the instituting of proceedings by the United States District Attorney "upon affidavit showing good cause therefor." Good cause is sufficiently set forth by the affidavit of Jeannette Ryan attached to the Bill. (Tr. pp. 13-20.)

In *U. S.* v. *Daimer,* 249 Fed. 989, at p. 990, Judge Ashmann said:

> "The showing of the affidavit is held to warrant the District Attorney, in the exercise of his discretion, in bringing the suit. The allegations charging the defendant with falsely taking an oath renouncing his allegiance to Germany and the German Emperor by means of which false oath defendant secured his certificate of naturalization, are sufficient as against a demurrer or motion to dismiss."

The Circuit Court of Appeals in *U. S.* v *Salomon,* 231 Fed. 928, while holding the affidavit of good cause insufficient, suggests that setting forth a fact

upon which a certificate of citizenship might have been denied, would have been sufficient.

Moreover, doubts as to whether or not conditions required by statutes for admission to citizenship have been performed, should be resolved in favor of the Government.

U. S. v. *Griminger,* 236 Fed. 285.

In *U. S.* v. *Ginsberg,* 243 U. S. 472; 61 L. Ed. 853, at 856, Mr. Justice McReynold delivering the opinion, said:

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it, as provided in Sec. 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential."

And it would seem to us no different if the "manifest mistake" was caused by the fraud of the petitioner.

THERE IS EVIDENCE OF FRAUD COMMITTED BY APPELLANT AT THE TIME OF THE ISSUANCE OF THE CERTIFICATE OF NATURALIZATION SUFFICIENT TO SUSTAIN THE COURT'S DECREE.

The main contention of counsel for appellant appears to be that since evidence of the fraud alleged to have been committed in 1904 was not disclosed or discovered until 1916, that such evidence may not be taken to establish condition of mind existing at that time.

The acts of appellant proved to have been committed in the years from 1914 to 1917 and even up to the time that the bill was lodged against him in May, 1918, cannot be taken but showing a clear allegiance to the German Emperor, and a want of allegiance to the Government of the United States of America.

It should be enough to refer to the fact that Dr. Schurmann the appellant. takes full responsibility for the book "The War as seen through German Eyes," as a "brief and sincere expression of my feelings and opinions, together with indisputable 'facts' regarding the great international struggle now going on in Europe." (Tr. p. 50) that he admits that the book was intended as propaganda (Tr. pp. 291, 292); although he attempts to argue that such propaganda was merely to keep the United States out of war and circulated before this nation was at war, yet he sought permission to distribute copies of the book subsequent to declaration of war by the United States on Germany (Tr.

pp. 261, 262); that he offered copies of the book to be read after the United States had entered the war (Tr. p. 268); that he likened change of allegiance to a country to a change of taste for a good cigar (Tr. p. 251), and that while the country was at war he was planning in his mind how he might avoid passport requirements and reach Germany through Mexico (Tr. p. 283).

As said by the Court in opinion (Tr. pp. 193-196):

"But in view of the mass of evidence of his disloyalty appearing in a certain book written and published by him in August, 1916, which has been introduced in evidence, it is really unnecessary to notice the evidence of oral expressions.

"The title of this book is 'The War as Seen Through German Eyes.' It is about as poisonous German propaganda as was ever fabricated. The respondent admits it was propaganda, and that it was intended to create sentiment to prevent the United States from going to war with Germany. It is a bitter denunciation of all men and nations standing in the way of German success, and a laudation of all things German. It is full of falsehoods in regard to the origin, cause and conduct of the war, and of false accusations against the allied nations and against the Government and people of the United States and the President of the United States; and the hatred exhibited in it against Great Britain and the peculiar affection displayed towards "downtrodden Ireland," are such as are rarely to be found elsewhere than in the heart of the Hun. In it respondent complains against the United States and the President, because of the sale of arms and munitions by citizens of the United States

to Great Britain and her allies, and complains against the President for "killing" the resolutions offered in Congress to warn Americans to keep off the ships of the Allies, and he justifies and applauds the murdering of 114 Americans on board the "Lusitania" when she was sunk in violation of law and in violation of the rights of every person on board. He accuses the owners of the "Lusitania" of being "guilty of this terrible calamity" because, as he charges, the (59) vessel was laden with arms and ammunitions, and they "knew the submarines would lay for her"; and he denounces the United States Government as guilty because it did not "Prevent any one from sailing on the doomed ship," and he denounces "the reckless passengers themselves, who disregarded the often repeated and earnest warnings not only published by the German authorities, but also sent by the German authorities to each of these passengers individually." But for the murderers who committed the crime he sings a hymn of praise and says he would do as they did himself if he were in command of a submarine and had the opportunity, and that he knows "you" would do so also.

Respondent said in an article published in the "Honolulu Star-Bulletin," on August 11, 1915, which he introduced in evidence, that when he learned "that Germany had declared war upon Russia," his "first thought was to serve the Fatherland," and he "went to the German Consul here and offered his services, which were accepted"; and he further said in the same article: "Plans were already begun for starting to the front when I suffered a stroke of paralysis and was rendered blind and practically unable to move." After reading this book, in the light of subsequent events, and comparing the propaganda put forth in it with other propaganda of the German Government, the evidence is very strong that respondent permitted

himself to be used as a tool by the German Government acting through its Consul in Honolulu, to disseminate its propaganda under the cloak of American citizenship, and this was the "service" to the "Fatherland" the Consul gave him to do.

It is not necessary to review the book or any of the many false charges in it against the Government and people and President of the United States. It is one hundred and forty-two pages of lying propaganda designed to stir up sentiment to embarass the Government of the United States in the conduct of our affairs with (60) Germany and to deprive the President of the United States of the support of the American people in the correct and courageous stand he had taken in defense of American rights against outrageous German aggression. It is sufficient to say that the publication of it is sufficient evidence of respondent's disloyalty to the United States and allegiance to the German Emperor.

FACTS OCCURRING AT ANY TIME MAY BE TAKEN AS EVIDENCE OF FRAUD IF FROM THEM FRAUD MAY REASONABLY BE PRESUMED.

Dr. Schurmann's allegiance, either to the German Emperor or to the United States, was a matter of fact entirely subjective at the time he was given the certificate of naturalization, and it was only when that subjective condition of his mind met with the situation that caused him to evince outwardly what it was, that we have any evidence, other than his oath of allegiance, from which might be determined what his true state of mind was and he was not entitled to remain undecided but his oath of

allegiance required that he actively participate from that moment both in the responsibilities as well as the benefits of citizenship.

It is a natural inference that the enjoyment of the benefits of citizenship for twelve years should have strengthened his allegiance so that when the test came, if he ever had the intention of supporting the constitution and laws of this Government against any foreign potentate, he would not have hesitated in giving his allegiance first and always to the United States. He took the oath of allegiance for the purpose of obtaining a privilege and the oath must have contemplated allegiance as long as the privilege lasted.

It was said in *U. S.* v. *Wurstervarth,* 249 Fed. 908:

> "If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present. Whatever presumption might other-

> wise arise in his favor from the apparent fact that during the intervening years he has lived as a good citizen of this country is of no weight, when it is considered that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—*i.e.,* the war between this country and Germany—he immediately manifested it."

It is argued that it is not legitimate to presume that his mental attitude today is the same as it was 35 years ago, because as a general rule presumptions do not "run backwards." I will readily concede that proposition. However, without attempting to differentiate, if indeed there is any real distinction, between a strictly legal presumption of fact, which constitutes at least *prima facie* proof of a matter on controversy, and the probative value of one circumstance in establishing another fact, there are many cases in which it is permissible to infer the existence of one fact from proof of subsequent facts. If the natural and probable inference to be drawn from a proven fact is the existence of another fact, it makes no difference whether the latter fact be before or after, in point of time, the fact from which the inference is to be drawn. The decisive point is whether the inference is a natural and probable one. That principle is recognized by all the authorities, and is supported by every consideration of reason. It will be sufficient, I think, to refer to the remarks of the Supreme Court in *Luria* v. *United States,* 231 U. S. 9, 27, 34 Sup. Ct. 10, 58 L. Ed. 101, where this very section of the Naturalization Act was under consideration, and *Ellis* v. *State,* 138 Wis. 513, 119 N. W. 1110, 20 L. R., A. (N.S.) 444, 131 Am. St. Rep. 1022, a case relied upon by counsel for the respondent."

The utmost good faith is required of the alien

who seeks to become a citizen and anything which shows bad faith on his part should be sufficient ground for denying him the privilege, even though discovered long after the privilege was granted.

In *U. S.* v. *Albertini,* 206 Fed. 133, a certificate of naturalization was cancelled for fraud in that the applicant swore that he was unmarried, when as a matter of fact he had deserted his family.

In *U. S.* v. *Mansour,* 170 Fed. 671, certificate was cancelled for bad faith in not intending to make the United States his home and desired citizenship for protection in a foreign country.

In *U. S.* v. *Ellis,* 185 Fed. 546, the certificate was cancelled for fraud in that the applicant did not intend to become a permanent citizen.

In *U. S.* v. *Snelgin,* 254 Fed. 884, and *U. S.* v. *Stuppiello,* 260 Fed. 483, certificate cancelled on the ground that applicants did not disclose fact that they were anarchists.

> See also *U. S.* v. *Simons,* 170 Fed. 680., and *Grahl* v. *U. S.* (C. C. of A. 7th Circuit), 261 Fed. 487.

It is respectfully submitted for the Government that Dr. Schurman violated his oath of allegiance to the United States and espoused the cause of the German Empire in such glaring manner that it is

impossible to believe otherwise than that his oath of allegiance was not made in good faith and that it would not only be a dangerous precedent to allow the granting of the privilege of citizenship to be returned to him but it would be manifestly unfair to the hosts of those of the naturalized citizens of the country who have stood the test of their allegiance and remained true to the country of their adoption in its time of trial.

Respectfully submitted,

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